of exercising these rights (i.e., attribution) against the business need to obtain the rights in the first instance (i.e., keeping the company honest). Recognizing the legitimacy of and need for such rights, however, does not require the Commission to ignore abuses of its rules. If the Commission learns of circumstances in which, for example, applicants avoid full disclosure of the identity and media interests of supposedly passive parties who have the unilateral right to convert their interests to voting interests after consummation, the Commission should take appropriate enforcement action. Such cases are fundamentally different from circumstances in which truly passive investors must exercise rights to protect themselves from the adverse consequences of events beyond their control. Finally, the Commission should also clarify that the threat of exercise of such rights in an effort to avoid these undesirable consequences in the first instance should not be deemed to confer an attributable level of influence on the holder.[36]

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[35] (...continued)

> fundamental changes in corporate structure, including merger or dissolution. We also clarify that non-majority or non-voting investors may hold rights of first refusal, provided that right is exercisable only to prevent dilution of the investor's interest of a transfer of control by the control group to a third party.

Id. at ¶ 81 (footnotes omitted).

[36] This interpretation is consistent with the 1984 Attribution Order, in which the Commission stated that if a conversion of non-voting stock would not violate the multiple ownership rules, "reliance upon [the conversion right] to exert influence does not contravene the purpose of the multiple ownership rules." 97 F.C.C.2d at 1021.

VII. LIMITED PARTNERSHIP INTERESTS

A. Passive Limited Partnership Interests Are an Important Source of Capital in the Broadcasting Industry

The licensees of broadcast stations and the entities that control them are frequently organized as partnerships to avoid the double taxation associated with the corporate form of business organization.[37] Moreover, as noted by several commenting parties, much of the capital made available to broadcasters in recent years has come from funds that are organized, for business and tax reasons, as limited partnerships.[38] The attribution rules apply to licensee partnerships, partnerships that control licensees, and partnership funds that invest in broadcast licensees or their parent companies. Participants in these funds include financial institutions, financial services companies, pension funds, and other entities and individuals, most of whom have no interest whatsoever in micro-managing either the fund's investments or the businesses in which the fund invests. Yet under the Commission's current attribution rules, unless the fund's limited partnership agreement recites in full all of the current insulation criteria, the media interests of the fund's broadcast investments are deemed attributable to the fund's limited partners and the other media interests of those limited partners, if any, are deemed attributable to the broadcast company in which the fund has invested. As a result, many such funds are discouraged by these regulatory burdens and consequences from investing in the broadcast industry.

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[37] Of the 22 sales in 1994 of stand-alone television stations with a purchase price in excess of $20 million, nine (41 percent) involved partnerships as either the buyer or the seller. See "The $1 Million-Plus Club," Broadcasting and Cable at 45-46, 76 (February 27, 1995).

[38] See, e.g., Comments of M/C Partners, The Blackstone Group, and Vestar Capital Partners at 23.

B. The Current Insulation Criteria Should Be Revised or Eliminated

When first articulated by the FCC, the insulation criteria created a "safe harbor" for limited partnerships and were not considered mandatory for inclusion in agreements for limited partnership in which the limited partners sought exemption from ownership attribution. Thus, if more general or broadly-worded provisions of the limited partnership agreement prohibited the limited partners from becoming materially involved in the partnership's media business, the general partner legitimately could certify to that effect in the ownership reports. See 1985 Attribution Order, 58 R.R.2d at 618-620. Indeed, when it first outlined the insulation criteria, the Commission stated: "We also wish to make clear that these guidelines are not incorporated into our rules and serve only to indicate the type of insulation the Commission will consider in evaluating challenges to the exclusion." Id. at 619 (emphasis added). Moreover, Note (g)(2) to Section 73.3555 of the Commission's rules currently states that "[i]n order . . . to make the certification set forth [above], [the licensee] must verify that the partnership agreement or certificate of limited partnership, with respect to the particular limited partner exempt from attribution, establishes that the exempt limited partner has no material involvement, directly or indirectly, in the management or operation of the media activities of the partnership. The criteria which would assure adequate insulation for purposes of this certification are described in [Attribution Reconsideration]." 47 C.F.R. § 73.3555, Note (g)(2) (1993) (emphasis added). Over the years, however, the FCC's interpretation of the insulation criteria has evolved to the point where the proper incantation of these criteria must be included in the partnership agreement to ensure insulation and non-attribution of media interests.

GE Capital believes that the insulation criteria should be substantially revised or eliminated because they do not comport with business reality,[39] they discourage investments by sophisticated sources of capital,[40] and they involve subjective interpretations that lead to abuse and selective enforcement. Moreover, many investors are approached to invest in a limited partnership after the organizational documents have been finalized and executed. These documents may not contain a proper recitation of the insulation criteria, particularly if the limited partnership was not formed specifically for the purpose of investing in broadcast properties. Under such circumstances, the prospective investor may not have the ability to insist upon amendments that restrict the rights of the limited partners far beyond that required by state law to ensure limited liability, particularly if the investor is taking a relatively small equity position.[41] Further, many limited partners may not wish or need to subject themselves to such harsh restrictions. In such circumstances, the partnership is compelled to create multiple classes of limited partners, which substantially increases transaction costs and administrative burden without corresponding benefit.

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[39] Indeed, the prohibition on communications between the limited partners and the general partner could be construed even to prohibit the limited partners from attending the partnership's annual meeting. While some limited partners may not care, others -- particularly those with fiduciary duties, such as pension funds -- may feel obligated to attend such meetings and yet must also ensure that the investment remains non-attributable. Similarly, the inability to remove a general partner for cause unless such cause has been determined by a third party (i.e., an arbitrator) unduly restricts such investors in the exercise of their fiduciary duties. Such restrictions make no business sense in the highly competitive world of broadcasting.

[40] Cf. Comments of Goldman Sachs Group, L.P. (investment banks cannot provide investment banking services to media limited partnerships in which they hold limited partnership interests).

[41] Under the current rules, a non-insulated limited partnership interest of any size is considered an attributable interest.

C. The Commission Should Adopt a Simple and Realistic Test for Insulating Limited Partnership Interests

For the foregoing reasons, the Commission should abandon its current insulation criteria and adopt instead a simple and realistic test for determining whether limited partnership interests should be insulated. Possible tests include (i) a certification that the limited partnership complies with the requirements of the Uniform Revised Limited Partnership Act for limited liability, regardless of the state of formation, or (ii) a certification that the limited partnership complies with the requirements of its state of formation for limited liability. In each case, these standards have been hammered out over the years by courts, legislatures, and the Commission on Uniform State Laws to achieve a proper balance between the public policy objectives of placing liability where it belongs and the goal of facilitating investments in business. The Commission's attribution rules also require such a balancing, which could be achieved, GE Capital submits, by conforming the insulation criteria to existing state law. If the Commission is concerned that in the absence of the current insulation criteria, limited partners will step over the boundaries and become actively involved in the day-to-day business of broadcasting, it should deal with such matters on a case-by-case basis under its enforcement authority.[42]

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[42] If the Commission is unwilling to abandon or revise the current insulation criteria, it should, at a minimum, adopt an non-attributable equity benchmark of 20 percent for those limited partnerships that conform to state law for the purpose of limited liability, regardless of whether the FCC's current insulation criteria are included in the limited partnership agreement.

VIII. LIMITED LIABILITY COMPANIES

A. Limited Liability Companies Are Important New Investment Vehicles for the Broadcasting Industry

Limited liability companies ("LLCs") are an important new investment vehicle that combines the limited liability of corporations with the tax treatment (in certain circumstances) of partnerships. As a result of their favorable tax treatment, LLCs are stimulating new investment in the broadcasting industry. Because the LLC is a relatively new business form, the FCC has not previously addressed the treatment of LLCs for attribution purposes. In the Notice, however, the Commission tentatively proposes to treat LLCs as it now treats limited partnerships. For the reasons set forth below, GE Capital believes that such treatment is unduly restrictive and will discourage the use of LLCs in the broadcast industry, thereby diverting important sources of capital.

LLCs are recent statutory creations that are now authorized under the laws of 48 states and the District of Columbia. The statutes authorizing the formation of LLCs typically give the parties forming an LLC flexibility in defining the structure and operational characteristics of the LLC in the LLC agreement. The key attribute of LLCs is that, although they can be structured to give investors benefits similar to those afforded by corporations, the Internal Revenue Service will tax LLCs in the same manner as a partnership provided certain conditions are met. Therefore, a properly structured LLC can be a powerful tool in attracting new capital to the broadcasting industry, particularly for those groups (i.e., women and minorities) who have been historically underrepresented in broadcast station ownership.

The controlling statutes permit the LLC agreement, like a corporate charter or a partnership agreement, to establish the relationship among the members (i.e., the equity owners) and the manner in which the LLC's business will be conducted and managed. Federal tax regulations provide, in effect, that tax treatment of the LLC will depend on how many of the following four criteria are included in that agreement:

1. Centralized management
2. Limited liability (i.e., liability for the LLC's debts is limited to the LLC's property)
3. Continuity of existence
4. Free transferability of equity interests

An LLC will be taxed as a corporation if it has three or more of these attributes, but it may be taxed as a partnership if no more than two of these attributes are present. An LLC agreement therefore can provide limited liability (as an inducement to investors) and centralized management (to enable the Commission to treat it as a corporation for purposes of its attribution rules and policies) and the LLC will still be taxed as a partnership if the LLC agreement negates continuity of existence and free transferability of interests.

B. The Attribution Treatment of LLCs Should Reflect the Structure and Governance of the Particular LLC Entity

An LLC structured to parallel the organization and operation of a corporation typically will provide for voting and possibly non-voting equity interests. Voting members of an LLC elect a board of managers, which, like a corporate board of directors, is solely responsible for managing the LLC business, setting policies, and selecting the LLC's officers. The officers, with the same titles and responsibilities as corporate officers, are responsible for the day-to-day operation of the business. Non-voting members are passive investors who have no participation in the control or management of the LLC. Because they do not vote for managers who have ultimate responsibility for the business, non-voting LLC members are presumptively incapable of influencing the affairs of the LLC and thus are no different from non-voting shareholders in a corporation. Therefore, for purposes of the Commission's attribution rules and policies, this "corporate" form of LLC should be treated no differently from a corporation: the voting members should be treated in the same manner as voting shareholders of a corporation and its non-voting members should be exempt from attribution upon certification by an officer of the LLC that:

1. The LLC agreement establishes a board of managers.

2. Voting members of the LLC have the exclusive right and power to elect the board of managers.

3. The board of managers has the exclusive right and power to manage the LLC's business, establish its policies, and select the officers who are responsible for the implementation of those policies and the day-to-day operations of the business.

4. Non-voting members of the LLC (if any) have no right or power to influence or control the day-to-day management or operations of the LLC or to participate in any way in the election of its managers or officers.[43]

Alternatively, an LLC may adopt a structure that does not provide for a board of managers or officers. In such an LLC, all voting members are involved in the company's

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[43] According to a recent report in <u>The Washington Post</u>, the Internal Revenue Service is considering adopting a procedure in which LLCs indicate their tax status as partnerships or corporations by checking the appropriate box on the tax return. This procedure would avoid the current burden of issuing numerous private rulings on LLC tax status. <u>See</u> Albert B. Crenshaw, "More Entrepreneurs Trying Limited Liability Companies," <u>The Washington Post</u>, July 9, 1995, at H1, H6.

decisions and have the power and/or the responsibility to participate in its day-to-day operations. For purposes of the FCC's attribution rules, this "member-form" LLC should be treated as a partnership, because all members may, collectively or individually, conduct the affairs of the company. If such member-form LLC has only voting members, then it should be treated as a general partnership, and all of the members' interests in the LLC should be deemed attributable. If a member-form LLC also includes non-voting members, then such LLC should be treated in the same manner as a limited partnership in that the non-voting members of the member-form LLCs should be exempted from attribution upon certification by a voting member of the LLC that the LLC agreement contains provisions insulating the non-voting members from participation in the management or operation of the LLC.

IX. COMBINED NON-ATTRIBUTABLE INTERESTS

A. The Commission Should Not Expand Its Regulation of Combined Non-Attributable Interests

The Commission seeks comment in the Notice on whether multiple business relationships and combinations of non-attributable interests raise diversity and competition concerns warranting greater regulatory oversight. With respect to combinations of interests held by passive investors, the answer must be an unqualified no. Investors in the broadcast industry combine their various non-attributable interests for valid economic and business reasons that have nothing to do with control. Lending to the broadcast industry entails a substantially greater risk than lending to other businesses because under current law, loans to broadcast licensees cannot be secured by taking a security interest in the asset of greatest value -- the broadcast license. Under such circumstances, the debt rate of return, standing alone, often is inadequate to justify the risk of investing substantial sums of money in a broadcast enterprise. Therefore, lenders and other investors look for other means to ensure a return on their investments and, consequently, often combine debt and non-voting equity. If such combined interests were deemed attributable or even subjected to burdensome, time-consuming, and unpredictable case-by-case review to determine their attribution status, important sources of capital would disappear.

B. The Commission Should Expand Its Existing Safe Harbor for Passive Investors

For the reasons set forth above in its discussion of the rights of non-voting shareholders, GE Capital urges the Commission to clarify that non-voting shareholders may protect their passive investments and reduce their risks through contingent rights, which are triggered by events beyond the investor's control and which, until exercised, do not result in attribution. If, as a result of these rights, the lender-investor seeks to acquire control of the broadcast licensee, it can go through the appropriate regulatory channels and seek FCC approval, as discussed above. Moreover, when previously passive lenders or investors acquire control over a broadcast licensee pursuant to prior FCC consent to protect their investments, they should be granted a safe harbor from any resulting violations of the multiple ownership rules for a period of time, rather than being required to seek a waiver of the rules.

The FCC's rules currently create such a safe harbor for passive investors who are entitled to the 10 percent voting stock benchmark, recognizing that institutional investors have a duty to protect company assets and the interests of the company's shareholders.[44] However, the definition of "passive investor" for purposes of this safe harbor includes only

[44] 1985 Attribution Order, 58 R.R.2d at 612-13.

investment companies as defined in the Investment Company Act, insurance companies, and banks holding stock through their trust departments.[45] This definition is too narrow and prejudices other passive investors and lenders who generally have no desire to be involved in day-to-day operational matters of the licensee and seek control reluctantly and as a last resort to protect the value of the assets in which they have placed their investors' money.

GE Capital believes the Commission can expand the definition of passive investors for purposes of both this safe harbor and the more relaxed attribution standards applicable to such investors by adopting criteria that would protect against abuse of these exemptions while encouraging greater investment in the broadcast industry. Specifically, GE Capital urges the Commission to expand the definition of passive investor to include diversified companies, including but not limited to financial services companies, who are reporting companies under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), and at least some percentage (e.g., 50 percent) of the consolidated assets of which (including stockholdings and loan portfolios and the assets of wholly owned subsidiaries and affiliates) fall outside the scope of the FCC's multiple and cross-ownership rules. A company that meets this proposed definition of a passive investor should be entitled to the safe harbor and subject to the relaxed attribution rules even if it is affiliated with a broadcast or cable company because the objective criteria incorporated in the definition will ensure that the passive investor is a legitimate business enterprise that operates independently of its broadcast or cable affiliate. By extending the definition of passive investor to include reporting companies under the Exchange Act, who are required to regularly report material information concerning their

[45] See 47 C.F.R. § 73.3555, Note 2(c) (1994).

operations pursuant to the Rules and Regulations of the Securities Exchange Commission ("SEC"), the FCC will ensure that it and third parties can verify through publicly available information the true nature of such a company's business.[46] Moreover, by establishing an appropriate benchmark of greater than 50 percent for consolidated assets unrelated to the media ownership interests regulated by the FCC, the Commission will ensure that companies primarily engaged in the broadcast or cable industries cannot engage in creative corporate restructurings to take unfair advantage of the relaxed attribution rules available to bona fide passive investors.

X. CROSS-INTEREST POLICY

A. The Cross-Interest Policy Contributes Nothing But Uncertainty and Should Be Eliminated

The cross-interest policy was developed as an adjunct to the multiple ownership rules. Those rules have been expanded and refined in the intervening years, thus obviating the need for the policy. Because the cross-interest policy is applied on a case-by-case basis, the standards are unclear, which leads to enormous uncertainty in structuring investments.[47] Moreover, because the interests swept within the purview of the cross-interest policy are by definition non-attributable, it can be very difficult and expensive to obtain the information needed to comply with the reporting obligations, with no corresponding benefit.

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[46] If the information provided to the SEC is not sufficiently detailed in a particular case to reflect the distinction between assets regulated by the FCC and assets not so regulated, the parties could supplement this information with a certification supplied to the FCC, as is currently required for non-attributable limited partnership interests.

[47] See Notice, ¶ 90.

B. The Objectives of the Cross-Interest Policy Can Be Achieved Through Other Means

The objectives of the cross-interest policy can be achieved through application and enforcement of the antitrust laws, the FCC's multiple and cross-ownership rules, and the FCC's current rules and policies with respect to unauthorized transfers of de facto control. Since the policy no longer serves an independent purpose that is not served more effectively by these other laws, rules, and policies, its continued existence is simply a hindrance to investors. As GE Capital has urged throughout these Reply Comments, the Commission's regulatory goal should be to promulgate clear rules with bright-line tests that it enforces uniformly. The cross-interest policy is directly contrary to this goal and should be decisively and finally eliminated in this proceeding.

XI. GRANDFATHERING

The overwhelming majority of commenting parties agrees that any changes in the attribution rules -- particularly any changes that render the rules more restrictive -- must be prospective only. As the commenting parties have demonstrated, substantial recent investments in the broadcast industry have been predicated upon the current attribution rules. If these existing investments are not grandfathered, but rather are forced to come into compliance with new, more restrictive rules, the economic consequences to the industry will be devastating just when it is facing its greatest competitive and economic challenges. Nor would such mandatory restructuring be fair to the investors who showed their faith in the broadcasting industry by investing their money in it, particularly when -- as now -- the industry appears on the verge of a period of unprecedented growth, creativity, and profitability.

Respectfully submitted,

By: Margaret L. Tobey, P.C.

Margaret L. Tobey, P.C.
AKIN, GUMP, STRAUSS, HAUER & FELD, L.L.P.
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 887-4377

Its Attorneys

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